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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

BLUE JEANS EQUITIES WEST
A JOINT VENTURE
Petitioner,

VS.

CITY AND COUNTY OF SAN FRANCISCO
A MUNICIPAL CORPORATION,
Respondent.

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioner BLUE JEANS EQUITIES WEST, A Joint Venture ("BJEW") submits this reply to the Brief In Opposition ("City Brief") filed by Respondent CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation ("City").

A. *Nollan* Is A Regulatory Takings Case. It Establishes Constitutional Limits Applicable To Exactions In All Forms

Notwithstanding the statement of this Court in *Yee v. Escondido,* 60 U.S.L.W. 4301 (April 1, 1992), most of the City Brief (City Brief 13-21) is devoted to the argument that *Nollan* applies only to "possessory takings" cases.

NOTE: In all quoted material, footnotes are omitted and emphasis is ours unless otherwise stated. We support factual statements by citation to the record before the California Court of Appeal in the manner we followed in our Petition.

Presumably, even City would acknowledge that the Fifth Amendment imposes *some* limitation upon its ability to restrict the exercise of property rights through regulatory fees.[1] Because the Fifth Amendment protects individual rights, questions arising under it begin with an assessment of the burden upon the property owner—the extent to which individuals may be required to accept governmental restrictions on the enjoyment of property interests without payment of just compensation.[2]

A regulatory imposition requiring payment of a fee burdens the right to use property as surely as a requirement that the property owner dedicate an easement over a portion of it. And presumably even City would acknowledge that a fee so large as, for example, to exceed the value of the property would raise serious Fifth Amendment questions, even when it is not coupled with a requirement that the property owner directly give up any possessory or freehold interest in the property as a condition of the right to use it.[3]

If money is property and a payment requirement is a burden that can be as (or more) onerous than a requirement or dedication—*depending upon the facts of each case*[4]—the error in the

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[1] A key section of the *Nollan* opinion (*Nollan v. California Coastal Commission*), 483 U.S. 825 (1987) postulates an example of a fee that would violate constitutional limits. 485 U.S. at 837. The Court's reference to "extortion" and "leveraging of the police power . . . " [*Ibid.*] also imply excessive *monetary* exaction.

[2] See *e.g., Armstrong v. United States,* 364 U.S. 40, 49 (1960).

[3] City cites *United States v. Sperry Corporation,* 493 U.S. 52 (1989) in support of its arguments that payments of fees do not raise Fifth Amendment issues. Among other things, however, this Court decided in *Sperry* that the claimant *did not have a property interest* that had been taken or impaired. 493 U.S. at 59. The Court then sustained the fee in question as reasonable under the circumstances pursuant to federal law applicable to user fees. Because the fee was not required to be paid as a condition to the exercise of a property right, *Sperry* does not apply here.

[4] Takings cases are decided on their particular facts taking into account the particular burden imposed by the regulation under attack. See *e.g., Keystone Bituminous Coal Association v. DeBenedictis,* 480

City's argument and in the decision of the Court of Appeals is clearly exposed. They create a formalistic distinction without substantive foundation. For if City and the Court of Appeal are correct, any public agency with the power of condemnation can levy regulatory fees—and then use the funds thus raised for the express purpose of acquiring easements and other property interests that the condemning authority could not lawfully exact as a permit condition.[5] Because the property owner would be "compensated" for the possessory interest taken, the Fifth Amendment's guarantee would be satisfied as to that aspect of the transaction[6] and would not apply to limit the fee exaction.

Thus *Nollan* becomes dead letter, killed by subtle trickery. No lower court opinion or learned commentary can obscure the fact that City's argument and the decision below lead directly to that result.

U.S. 470, 492-93, 495 (1987); *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 224 (1986); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 138 (1978).

[5] California law allows a public agency to assess a property owner for the cost of condemning interests in the owner's property that the owner refuses to dedicate. *Cogan v. City of Los Angeles*, 34 Cal.App.3d 516; 110 Cal.Rptr. 100 (1973). Such action requires only a loose showing of "benefit" to the owner, much less stringent than the *Nollan* nexus requirement. See, *e.g., Harrison v. Board of Supervisors*, 44 Cal.App. 3d 852; 118 Cal.Rptr. 828 (1975). In this way, an owner is compelled to pay for the acquisition of his own land in an involuntary sale.

[6] California law provides broad scope for the exercise of "cleverness and imagination" in the pursuit of such a scheme. Under *City of Porterville v. Young*, 195 Cal.App.3d 1260; 241 Cal.Rptr. 349 (1987) and *City of Fresno v. Cloud*, 26 Cal.App.3d 113; 102 Cal.Rptr. 874 (1972), the "just compensation" required to be paid would not compensate the property owner for the loss of the right to use his property, if the condemning authority first zones the property so as to require the public improvement as a condition upon the right of use.

In *Nollan*, this Court stated:

> We view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination . . . [O]ur cases describe the condition for abridgement of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. [Emphasis in original]. *Nollan*, 483 U.S. at 841.

If substance is to prevail over form, then the *Nollan* test must apply to *all* conditions imposed upon the exercise of such rights, regardless of the form they take or the kind of property they exact.

B. City's Argument That The Legislative Findings In the Transit Impact Development Fee Ordinance Are Conclusive Violates Fundamental Principles Of Constitutional Law

City contends that having established the facial constitutionality of the TIDFO, the constitutionality of the ordinance *as applied* to each affected property owner cannot be challenged. City Brief 21 *et. seq.* The *findings* in the TIDFO are, according to City, conclusive on the key issues of burden and mitigation. *Ibid.*

It is, of course, settled beyond argument that a statute or ordinance may be constitutional on its face and yet unconstitutional as applied to a particular regulated subject. In a facial attack, the plaintiff must demonstrate that there exists *no state of facts* to which the regulation can be constitutionally applied. See, *e.g., Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981). The inquiry in an "as applied" case addresses the facts of that specific case.[7]

City contends that all "as applied" questions have been foreclosed and rendered non-justiciable by general legislative findings in an enactment that was found constitutional without regard to

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[7] As this Court has often noted, Fifth Amendment cases are decided on their specific facts. See authorities cited at fn. 2.

Nollan[8] and the facts applicable to Levi's Plaza. This remarkable argument defies concepts of judicial review articulated as long ago as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and relied upon ever since.

C. As Applied To Levi's Plaza, The TIDFO Violates The *Nollan* Test

Having successfully urged the court below to disregard *Nollan* as the controlling precedent, City now contends that the TIDF complies with *Nollan* requirements in any case. City Brief 25 *et. seq.* City relies principally upon an environmental impact report that identifies transit impact as a possible project consequence. City Brief 9.

Under California law, an EIR provides information to the decision-makers. It does not embody or record their action.[9] The action in this case was the approval resolution. Ex.2. City conceded its legislative intent on the issue of transit impact when it adopted the approval resolution *by stipulation* (AA 29; ¶ 18) *and by statement of its counsel at trial.*[10]

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[8] *Russ Building Partnership v. City and County of San Francisco,* 44 Cal.3d 839, 845 n.6; 244 Cal.Rptr. 682; 750 P. 2d 324 (1988).

[9] See, *e.g., Laurel Heights Improvement Assn. v. Regents of the University of California,* 47 Cal.3d 376; 253 Cal.Rptr. 426; 764 P.2d 278 (1988); *Friends of Westwood, Inc. v. City of Los Angeles,* 191 Cal.App.3d 259, 266-67; 235 Cal.Rptr. 788 (1987).

[10] In its discussion of the other projects approved prior to the enactment of the TIDFO, City avoids reference to Wharf Park, a project considered and acted upon after approval of Levi's Plaza and before City approved any other project with a transit impact condition. Wharf Park is a *residential project,* located in the Northeast Waterfront. Ex. 19, AA 227, Strip. AA 29. The language of its approval resolution is identical to Paragraph 5(c) contained in the approval resolution for Levi's Plaza. See ¶ 6, Ex. 19. The language in all of the later projects differed materially from that used in the Wharf Park and Levi's Plaza approval resolution. Compare Ex. 2 and Ex. 19 with Exs. 7-11, 20. The imposition of the same condition on a *residential* project in the next action taken after approval of Levi's demonstrates that City's concern was related to the project's *location* and not its use. The TIDFO effectively redefined

> As of January 4, 1979 [the date when Levi's Plaza was approved] . . . *no [City] employee knew what kind of funding mechanism, if any, would be imposed on BJEW to mitigate the transit impact generated by the Levi's project.* RT 49:18-23.

The record in this case amply demonstrates that the transit problem posed by Levi's Plaza in January of 1979 was the problem of moving people between *the Downtown Area and the Northeast Waterfront.* It was a problem related to geography, not to use. The TIDFO was enacted to mitigate cumulative impacts only of office development in an entirely different and larger area. See Ex. 5.

After approving Levi's Plaza, City subsequently decided that the transit deficit in the Northeast Waterfront was part of a much larger problem, as the tail is part of an elephant. But having identified the tail as the problem related to Levi's Plaza, City cannot now saddle the project with the whole pachyderm.

City's reliance upon the EIR misstates the significance of that document and contradicts key facts that City has admitted.

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the nature of the impact and the mitigation condition two years after the fact.

> . . . A state connot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. ***Hughes v. Washington,*** 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring).

CONCLUSION

This case presents an important constitutional issue on a simple record. The decision below is as plainly wrong as it is clearly stated. The result sharply limits an important decision of this Court, exalts form over substance and establishes pernicious precedent.

BJEW's petition should be granted.

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Respectfully submitted,

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